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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL R. GRAY,

Defendant and Appellant.

D054326

(Super. Ct. No. SCN241822)

APPEAL from a judgment of the Superior Court of San Diego County, Joan P. Weber, Judge. Affirmed as modified with directions.

A jury found Michael R. Gray guilty of burglary (Pen. Code,¹ § 459) (count 1) and petty theft (§ 484, subd. (a)) (count 2). Gray waived his right to a jury trial on allegations of two prior theft convictions (§ 666) and three prior prison terms (§ 667.5, subd. (b)) and admitted all of the priors. The court sentenced him to five years in prison: the two-year middle term for burglary, a concurrent term for petty theft with a prior theft

¹ All statutory references are to the Penal Code.

conviction, and one year for each prior prison term. Gray appeals, contending the sentence for petty theft with a prior must be stayed (§ 654) because both counts resulted from one indivisible course of conduct. The People properly concede the point.

BACKGROUND

On February 15, 2008, Gray entered a Kohl's store. He removed two pairs of pants from a display, put them in a Kohl's shopping bag and went to the customer service counter. He exchanged two pairs of pants for a store credit. He left the store.

Kohl's personnel detained Gray. In the bag they found one pair of pants and a receipt for the return of two pairs. The receipt was in the name of Darrius Maddux. The police were summoned. Gray told an officer that he entered Kohl's with a bag containing a pair of pants, put two more pairs in the bag and returned one of those pairs and the pair he had carried into the store.

Gray testified he entered Kohl's with three pairs of pants in the bag, exchanged one, and returned the other two.

DISCUSSION

Section 654 bars double punishment, including concurrent sentences, for a course of conduct constituting one indivisible transaction with one criminal objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; *People v. Latimer* (1993) 5 Cal.4th 1203; *People v. Lee* (1980) 110 Cal.App.3d 774, 785.) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for

more than one." (*Neal v. State of California, supra*, at p. 19.) Here, the burglary and the petty theft constituted one indivisible transaction with one criminal objective. (*People v. Bernal* (1994) 22 Cal.App.4th 1455, 1458, quoted in *People v. Allen* (1999) 21 Cal.4th 846, 865.) The lesser of the two terms—the sentence for petty theft—must be stayed. (§ 654, subd. (a).)

DISPOSITION

The judgment is modified by staying the sentence for petty theft with a prior theft conviction (§§ 484, subd. (a), 666) (count 2). As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

McCONNELL, P. J.

WE CONCUR:

McDONALD, J.

AARON, J.